STATE OF MICHIGAN

COURT OF APPEALS

CHARLES C. COSTA, Individually and d/b/a COSTA PAINT STORE,

Plaintiff/Counter-Defendant-Appellant,

and

RONALD CAREY SCOTT,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant/Counter-Plaintiff-Appellee,

and

F MOSS WRECKING COMPANY,

Defendant-Appellee.

UNPUBLISHED
October 21, 2010

No. 291451
Wayne Circuit Court
LC No. 08-124254-CC

Before: ZAHRA, P.J., and TALBOT and METER, JJ.

PER CURIAM.

Charles Costa, as the owner, and Ronald Scott, as his tenant, seek compensation arising from the demolition of a fire-damaged building and the loss of the personalty contained therein. The trial court granted summary disposition in favor of the City of Detroit (the "City") and F Moss Wrecking Company ("Moss Wrecking"), finding Costa's and Scott's claims were precluded by the doctrines of res judicata and collateral estoppel because of a prior, unsuccessful complaint brought by Costa requesting an injunction to prevent the building's demolition. We affirm in part, reverse in part, and remand for further proceedings.

This Court reviews a trial court's decision on a motion for summary disposition de novo.[1] Summary disposition may be granted when a claim is "barred because of . . . prior judgment . . . ." Specifically:

> A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. MCR 2.116(G)(5). Moreover, the substance or content of the supporting proofs must be admissible in evidence. . . . Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant.[2]

Questions of law, including the application of legal doctrines such as res judicata and collateral estoppel, are reviewed de novo.[3]

Res judicata "bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first."[4] The doctrine bars "not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not."[5]

Although Costa and Scott contend that the 2005 action was not decided on the merits because there was no evidentiary hearing and the matter was quickly resolved, they cite no authority indicating that a decision "on the merits" requires an evidentiary hearing or a specified period of litigation. Their argument is inconsistent with the recognition that res judicata applies to default judgments.[6] As recognized by our Supreme Court, "an involuntary dismissal other than a dismissal for lack of jurisdiction or for failure to join a party . . . operates as an adjudication on the merits" unless the court specifies otherwise in its order for dismissal.[7] The 2005 action involved an involuntary dismissal, the exceptions identified in the court rule are not applicable, and the trial court did not include any language in its prior dismissal order suggesting that the dismissal would not operate as an adjudication on the merits. Thus, the first element of res judicata was satisfied.

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[1] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817(1999).

[2] *Id.* at 119 (citations omitted).

[3] *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

[4] *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 418; 733 NW2d 755 (2007) (citations and quotation marks omitted).

[5] *Id*. (citations omitted).

[6] *Schwartz v City of Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1991).

[7] *Washington*, 478 Mich at 414; see also MCR 2.205(B)(3).

Costa and Scott also contend that the claims alleged in the second action were not and could not have been resolved in the first. We agree that the first action did not resolve whether the demolition of the buildings constituted a taking of their property and did not address the City's role in the loss of personal property on the premises. To determine if a matter *could have been* resolved in a prior case, this Court uses a transactional test.[8] "The transactional test provides that the assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts give rise to the assertion of relief."[9] "Whether a factual grouping constitutes a 'transaction' for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in *time, space, origin or motivation,* [and] whether they form a convenient trial unit . . . ."[10]

Costa and Scott fail to address the transactional test and simply contend that the proofs for the two actions would be different. Contrary to their implication, the fact that the two claims require different evidence may have some relevance, [but] the determinative question is whether the claims in the [instant] case arose as part of the same transaction as did the claims in [the prior action.]"[11]

Although Costa and Scott do not develop the legal basis for their contention that they could not have brought an action for money damages with the 2005 action because the claim was not yet ripe, that argument implicates the time aspect of the transaction test. According to Costa's 2005 complaint, the City had begun demolition proceedings before Costa filed the 2005 complaint. Costa alleged in his first complaint that "[the City] has entered upon the property and begun demolishing the building and removing scrap and brick . . . ." Although the events had not entirely unfolded at the time the first complaint was filed, the commencement of the demolition that Costa sought to halt in the first action and the completion of the demolition that was the basis for the present action are "related" in time. The facts of the two claims are two points in the continuum of the demolition at the site satisfying the second element of res judicata.

With respect to the third element of res judicata, Costa does not dispute that he was a party to the first action. The 2005 action involved an adjudication on the merits and the matters alleged in the second case were or could have been resolved in the first complaint. Because Costa was a party to both actions, the trial court did not err in finding that Costa's claims in the 2008 action were barred by res judicata.

In contrast, Scott was not a party to the 2005 action and we conclude that he was not in privity with his landlord Costa. "To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to

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[8] *Washington,* 478 Mich at 420.

[9] *Id*. (citation and quotation marks omitted).

[10] *Id*. (citation omitted).

[11] *Houdini Props, LLC v City of Romulus*, 480 Mich 1022, 1025-1026; 743 NW2d 198 (2008) (citation omitted).

assert."[12] Application of the doctrine typically requires "both a substantial identity of interests and a working or functional relationship in which the interests of the nonparty are presented and protected by the party in the litigation."[13] For example, a successor personal representative who represents the same legal right that was represented by the initial personal representative is in privity with the initial personal representative.[14] In this case, Costa had no legal interest in Scott's personal property. Costa's legal interest in his own personal property may have been comparable to Scott's, but there was no showing of "a working or functional relationship" in which the interests of the nonparty, Scott, were presented and protected by Costa in the prior litigation.[15] Because Costa did not present or protect Scott's interests with respect to Scott's personal property in the demolition process in the 2005 action, Scott and Costa were not in privity for the purposes of res judicata. Accordingly, the trial court erred in determining that res judicata barred Scott's claims.

Costa and Scott also argue that the trial court erred in determining that collateral estoppel barred their claims. Collateral estoppel "requires that (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel."[16]

Costa and Scott's argument that collateral estoppel does not apply concerns the difference in the relief requested. But the doctrine may apply where a factual issue has been litigated regardless whether the relief sought in the two proceedings is the same. For example, where the effectiveness of a criminal defendant's attorney was decided in the criminal case, collateral estoppel bars the criminal defendant from relitigating the issue in a civil suit for legal malpractice.[17] Costa has failed to establish that the trial court erred in relying on collateral estoppel as a basis for precluding all of his claims in the present action.

Because Scott was not a party to the 2005 action, we conclude that the trial court did err in finding that collateral estoppel precluded Scott's claims. This Court has stated:

> Application of the doctrine of collateral estoppel requires that the respective litigants were parties or privy to a party to the prior action. . . . "Under the requirement of privity, only parties to the former judgment or their privies may take advantage of or be bound by it. A party in this connection is one who is directly interested in the subject matter, and had a right to make defense, or to control the proceedings, and to appeal from the judgment. A privy is one who,

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[12] *Washington*, 478 Mich at 421.

[13] *Phinisee v Rogers*, 229 Mich App 547, 553-554; 582 NW2d 852 (1998).

[14] *Washington*, 478 Mich at 422.

[15] *Phinisee*, 229 Mich App at 553-554.

[16] *Estes*, 481 Mich at 585.

[17] *Barrow v Pritchard*, 235 Mich App 478; 597 NW2d 853 (1999).

> after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase."[18]

Scott did not acquire an interest in the subject matter affected by the judgment after its rendition. Because he is not a privy to Costa and is not bound by the determinations in the prior action, the trial court erred in granting summary disposition on Scott's claims on the basis of collateral estoppel.

The City raises several alternative grounds for affirmance, which the trial court did not address. Our analysis of these arguments is limited solely to Scott's claims as we have already determined that all of Costa's claims are precluded by the doctrines of res judicata and collateral estoppel.

Initially, we reject the City's argument that it was entitled to summary disposition with respect to counts I through V of the complaint, which alleged claims for an unconstitutional taking/inverse condemnation.[19] The City's argument is based on several photographs that it contends establish that the fire-damaged building was a public nuisance, which it was entitled to abate. Applying the appropriate legal standard:

> [a] motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5).[20]

The complaint alleged that the building was structurally safe after the fire. Accepting that allegation as true, Scott's claims were not so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. Although the City submitted photographs of the building to rebut the allegation that the building was structurally sound, hearing on the motion was limited to the pleadings alone.[21] The City was not entitled to summary disposition under the cited subsection of the court rule.

But we do agree with the City that it is entitled to summary disposition with respect to the conversion claims in Counts V through X because Scott failed to plead those claims in avoidance

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[18] *Williams v Logan*, 184 Mich App 472, 478; 459 NW2d 62 (1990) (citations and quotation marks omitted).

[19] MCR 2.116(C)(8).

[20] *Maiden*, 461 Mich at 119-120 (citations omitted).

[21] MCR 2.116(C)(8).

of governmental immunity. "A municipal corporation is considered a governmental agency."[22] "Under the governmental tort liability act, a governmental agency is shielded from tort liability if it is engaged in the exercise or discharge of a governmental function."[23] "A governmental function is an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law."[24]

In response to the City's motion for summary disposition, Scott argued that conversion is an intentional tort. But the qualified grant of immunity for individuals for intentional torts has no bearing on the City's immunity.[25] Because Scott did not plead his conversion claim in avoidance of governmental immunity, the City was entitled to summary disposition with respect to that claim.

The City also argues that it is entitled to summary disposition with respect to the civil conspiracy claim because the claim requires proof of a separate actionable tort.[26] Our Supreme Court has stated:

> A conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a purpose not unlawful by criminal or unlawful means. In addition, at the core of an actionable civil conspiracy is a question of damages. . . . "The law is well established that in a civil action for damages resulting from wrongful acts alleged to have been committed in pursuance of a conspiracy, the gist or gravamen of the action is not the conspiracy but is the wrongful acts causing the damages. The conspiracy standing alone without the commission of acts causing damage would not be actionable. The cause of action does not result from the conspiracy but from the acts done."[27]

Several of this Court's decisions have restated this principle as requiring proof of a "separate, actionable tort." The City relies on case law that stands for the proposition that "a claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort."[28]

In response to the City's motion, Scott asserted that the conspiracy claim "arises out of the constitutional and conversion claims . . . ." The constitutional taking/inverse condemnation

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[22] *Roby v City of Mount Clemens*, 274 Mich App 26, 29; 731 NW2d 494 (2007).

[23] *Id*.

[24] *Id*. (citations and quotation marks omitted).

[25] See subsection (1) of MCL 691.1407.

[26] MCR 2.116(C)(8).

[27] *Fenestra Inc v Gulf American Land Corp*, 377 Mich 565, 593-594; 141 NW2d 36 (1966).

[28] *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569 (2003), aff'd 472 Mich 91 (2005), which quotes *Early Detection Ctr, PC v New York Life Ins Co*, 157 Mich App 618, 632; 403 NW2d 830 (1986).

claim is not a tort. Although torts, the conversion claims are not "actionable" with respect to the City because of governmental immunity. The City has not cited any authority that expressly addresses whether wrongful acts that were not a "tort" or were not "actionable" because of immunity would support a claim for conspiracy. Because the trial court did not address this issue, we decline to decide it at this juncture.[29] But, the City is free to raise this issue again on remand to the trial court.

Finally, the City argues that it is entitled to summary disposition with respect to count XII of the complaint, which sought to impose vicarious liability on the City for the alleged gross negligence of its 911 operator.[30] The record discloses that in the brief submitted in response to the City's motion for summary disposition that Scott affirmatively withdrew his claim. Because this claim was expressly abandoned, the trial court properly dismissed it and we affirm that decision.

In conclusion, we affirm the trial court's dismissal of all of Costa's claims. With respect to Scott, we reverse the trial court's order dismissing count III (taking of Scott's personal property) and count XI (civil conspiracy) because of the lack of privity and remand for further proceedings on these counts. We affirm the trial court's dismissal of all of Scott's remaining counts.

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Patrick M. Meter

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[29] See *Dalley v Dykema Gossett, PLLC*, 287 Mich App 296, 325; ___ NW2d ___ (2010).

[30] MCR 2.116(C)(7).